Supreme Court, U.S.
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No. 97-968

In The

Supreme Court of the United States

October Term, 1997

M/V IKAN SELAYANG, her engines, boilers, etc. and FEDNAV LIMITED,

Petitioners,

vs.

SOGEM-AFRIMET, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to the proceeding.

Respondent Sogem-Afrimet, Inc. is a wholly owned subsidiary of Sogem-Afrimet S.A. Sogem-Afrimet S.A. is a privately held Belgian corporation. There are no nonwholly owned subsidiaries of Sogem-Afrimet, Inc.

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STATEMENT OF THE CASE

In a case decided under the United States Carriage of Goods by Sea Act of 1936[1] ("COGSA"), Fednav Limited and the M/V IKAN SELAYANG, as Carriers, were found liable for rust contamination of a cargo of premium grade zircon sand owned by Sogem-Afrimet, Inc. The zircon sand cargo was carried from Australia to Texas aboard the M/V IKAN SELAYANG. The United States District Court for the Southern District of New York[2] awarded damages of $270,161.49 in favor of Sogem-Afrimet and against Fednav Limited and the IKAN SELAYANG[3]. The Second Circuit United States Court of Appeals affirmed the District Court's judgment by Summary Order.

Fednav Limited and the M/V IKAN SELAYANG have petitioned for a Writ of Certiorari to the United States Supreme Court, alleging a conflict between Courts in the Second, Fifth and Ninth Circuits in the application of COGSA. Petition at 1.

Sogem-Afrimet, Inc. contends that there is neither a conflict between Circuits nor any other compelling reason for review by this Honorable Court. Sogem-Afrimet, Inc. respectfully submits the within brief in opposition to the Petition as provided by Rule 15 of the Rules of the Supreme Court.

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1. 46 U.S.C. § 1300, *et seq.*

2. Honorable Bernard Newman, Senior Judge of the United States Court of International Trade, sitting by designation.

3. *Sogem-Afrimet, Inc. v. M/V IKAN SELAYANG, et al.*, 951 F. Supp. 429 (S.D.N.Y. 1996), *aff'd without opinion*, 122 F.3d 1057 (2d Cir. 1997). The text of the Second Circuit's Summary Order appears at 1997 WL 568687 (1997).

STATUTE INVOLVED

The United States Carriage of Goods by Sea Act of 1936 provides in part:

> **§ 1303. Responsibilities and liabilities of carrier and ship**
>
> **Seaworthiness**
>
> (1) The carrier *shall be bound*, before and at the beginning of the voyage, to exercise due diligence to —
>
> * * *
>
> (c) Make the holds . . . and all other parts of the ship in which goods are carried, *fit and safe* for their reception, carriage, and preservation.
>
> * * *

46 U.S.C. § 1303 (1936), Petition at 41a (emphasis added).

REASONS FOR DENYING THE WRIT

I.

THE ALLEGED CONFLICT BETWEEN THE CIRCUITS

The impetus behind the instant Petition is an excerpt from *obiter dicta* in this Honorable Court's decision in *Vimar Seguros y Reaseguros S.A. v. M/V SKY REEFER*, 515 U.S. 528, 539-40 (1995). Petition at 12.

To this the Petition adds a comparison of *Atlas Assurance Co., Ltd. v. Harper, Robinson Ship Co.*, 508 F.2d 1381 (9th Cir. 1975); *Sumitomo Corporation of America v. M/V SIE KIM*, 632 F. Supp. 824 (S.D.N.Y. 1985); *Sigri Carbon Corp. v. Lykes Bros. S.S. Co., Inc.*, 655 F. Supp. 1435 (W.D. Ky. 1987); and *Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 1992 AMC 1217 (S.D.N.Y. 1992) (not officially reported)[4]. Petition at 9-11.

The Petition alleges a material conflict between the aforementioned decisions as to whether, by means of a "Free In-Out" ("FIO") contract term, an ocean carrier may delegate its responsibilities under COGSA § 1303(2) to properly load and stow the cargo. Petition at 10-13. The Petition is incorrect for two reasons.

First, there is no conflict. Courts in the Second, Fifth and Ninth Circuits agree that a carrier may be exonerated under COGSA § 1304(2)(i) for cargo damage caused by a charterer-appointed stevedore. *Atlas*, *supra*, 508 F.2d at 1389; *Sigri*, *supra*, 655 F. Supp. at 1440; *Sumitomo*, *supra*, 632 F. Supp. at 841. Petition at 10-12. These cases all involved a "Free In-Out" ("FIO") contract term, and their holdings were based on an absence of *control* by the carrier over the persons or instrumentality which caused the cargo damage. *Atlas* at 1389; *Sigri* at 1440; *Sumitomo* at 841.

Second, the cases allegedly giving rise to the conflict are materially distinguishable from the case at bar. The decisions cited by petitioner involved cargo damage caused by stevedores appointed by charterers under FIO contract terms. The carriers in *Atlas*, *Sigri* and *Sumitomo* exercised no control over the persons and instrumentalities which caused the cargo damage, and could therefore claim exoneration under COGSA

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4. *rev'd*, 978 F.2d 47 (2d Cir. 1992).

§ 1304(2)(i) ("act or omission of the shipper or owner of the goods, his agent or representative").

The case at hand does not require a balancing of petitioner's COGSA § 1303 duties against their COGSA § 1304 immunities. This case does not involve damage to cargo by respondent-appointed stevedores, or damage to cargo caused by improper loading or stowage.

The decisions cited by petitioner reflect no conflict. Notwithstanding a FIO contract term, a COGSA carrier remains liable for the consequences of its own acts and omissions. *Atlas*, *supra*, 508 F.2d at 1389; *Sigri*, *supra*, 655 F. Supp. at 1438; *Sumitomo*, *supra*, 632 F. Supp. at 837.

II.

THE QUESTION OF DUE DILIGENCE

The sole question presented in this case was and is as follows: Did petitioner exercise the due diligence required by COGSA § 1303 to make the IKAN SELAYANG's Cargo Hold No. 6 fit and safe for respondent's cargo?

"Seaworthiness" under COGSA requires that the ship be "reasonably fit to carry the cargo she has undertaken to transport." *Sumitomo*, *supra*, 632 F. Supp. at 840. Petitioner concedes that it alone had the duty under COGSA § 1303 to use due diligence to make Hold No. 6 fit and safe for respondent's cargo. Petition at 15.

Petitioner's own "Standard Requirements" for the preparation of cargo holds to receive zircon sand stated *inter alia* that "any form of contamination is harmful." District Court's Opinion, Petition at 27a Section C. Their "Standard

Requirements" required that all rust be removed from cargo holds before loading zircon sand. District Court's Opinion, Petition at 11a and 23a.

The Master of the IKAN SELAYANG reported to petitioner that the condition of Hold No. 6, into which respondent's zircon sand was to be loaded, was "not so good." District Court's Opinion, Petition at 11a and 23a. At a port in the Philippines, about twenty shore laborers were put into Hold No. 6 to manually chip and scrape rust from the metal surfaces using sledge hammers, chipping hammers and scrapers. District Court's Opinion, Petition at 11a.

Manual chipping and scraping was only done to those portions of Hold No. 6 which the shore laborers could reach from the floor of the Hold. District Court's Opinion at 11a and 23a. Hold No. 6 was approximately 43 feet deep. District Court's Opinion at 13a. No scaffolding or lifts were used to give the laborers access to the upper portions of Hold No. 6. District Court's Opinion at 11a-12a. As a result, no attempt was made to apply the same chipping and scraping means to the upper portions of Hold No. 6 as were used in the lower reaches of that Hold. District Court's Opinion, Petition at 11a-12a and 23a.

The District Court held that the cause of the cargo contamination was the petitioner's failure to chip and scrape rust from the upper portions of Hold No. 6 as it did in the lower part of the Hold. District Court's Opinion, Petition at 22a-24a. The court held that petitioner failed to exercise the due diligence required by COGSA § 1303. District Court's Opinion, Petition at 28a.

III.

THE CARRIER'S COGSA DUTIES CANNOT BE DELEGATED

Petitioner notes that Mr. Pearson, an independent surveyor appointed by the shipper of the zircon sand, inspected Hold No. 6 prior to loading the cargo and found Hold No. 6 fit to carry zircon sand. Petition at 5. Petitioner argues that its obligation to exercise due diligence to make Hold No. 6 fit and safe was fully satisfied when Mr. Pearson approved the hold. This argument is without merit, and was accordingly rejected by the trial court. District Court's Opinion, Petition at 28a-30a.

Petitioner's obligation to use due diligence to make the cargo hold fit and safe for respondent's cargo could not be delegated to Pearson. *Associated Metals & Minerals Corp. v. M/V ARKTIS SKY*, 978 F.2d 47, 50 (2d Cir. 1992); *Nichimen Co., Inc. v. M/V FARLAND*, 462 F.2d 319, 332 (2d Cir. 1972).

Pearson's opinion as to the condition of Hold No. 6 did not lessen petitioner's responsibility for the consequences of its failure to properly chip and scrape the entire Hold. *GTS Industries S.A. v. S/S HAVTJELD*, 887 F. Supp. 531, 538 (S.D.N.Y. 1994), *aff'd*, 68 F.3d 1531, 1536 (2d Cir. 1995); *Blommer Chocolate Co. v. Nosira Sharon Ltd.*, 776 F. Supp. 760, 776 (S.D.N.Y. 1991), *aff'd without opinion*, 963 F.2d 1552 (2d Cir. 1992).

Petitioner further argues that Mr. Pearson's approval of the condition of Hold No. 6 was the proximate cause of respondent's cargo damage, and was thus an "act or omission of the shipper or owner of the goods, his agent or representative" which would exonerate petitioner under COGSA § 1304(2)(i). Petition at 14-16.

In the case at bar, petitioner had *exclusive responsibility* and exercised *exclusive control* over the cleaning and preparation of Hold No. 6. The decision to employ shore workers with sledge hammers, chipping hammers and scrapers in the lower portion of Hold No. 6 was petitioner's. The decision not to apply the same rust-removal efforts to the upper parts of the Hold was made only by the petitioner.

Mr. Pearson had neither responsibility for, nor any involvement in the preparation of Hold No. 6 to load the zircon sand cargo. Mr. Pearson did not cause rust to fall from the upper reacnes of Hold No. 6 to contaminate respondent's cargo. Mr. Pearson was not a cause in fact or in law of the cargo contamination. The District Court found that the sole factual and proximate cause of the cargo damage was petitioner's decision to do only half the job needed to properly prepare Hold No. 6. This was affirmed by the Second Circuit on the District Court's findings. Summary Order, Petition at 3a. It is respectfully submitted that this finding should not properly be the subject of further review by this Honorable Court.

CONCLUSION

Wherefore respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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